UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Ahmet FERRAJ,	:	
Petitioner,	:	
	:	
-vs-	:	3:02 CV 909(PCD)
	:	
John ASHCROFT,	:	
Respondent.	:	

MEMORANDUM OF DECISION

Petitioner–a resident alien of Albanian citizenship–challenges Respondent's deportation order in this habeas corpus action. Petitioner pled guilty to various crimes but failed to appear at a subsequent court proceeding, for which he was convicted of failure to appear under Conn. Gen. Stat. § 53a-172.[1]

An alien is subject to removal if convicted of a crime defined as an aggravated felony. 8 U.S.C. § 1227(a)(2)(A)(iii). "[A]n offense relating to failure to appear before a court pursuant to a *court order*" constitutes an aggravated felony.[2] 8 U.S.C. § 1101(a)(43)(T) (emphasis added). The Connecticut statute under which Petitioner was convicted, however, defines failure to appear as "wilfully fail[ing] to appear when *legally called* . . . ." Conn. Gen. Stat. § 53a-172(a)(1) (emphasis added). The issue is therefore whether Petitioner's conviction under § 53a-172 constitutes an aggravated felony as defined by § 1101(a)(43)(T).

In conducting such inquiry, the court employs a "categorical approach," conducting "an analysis that is focused on the intrinsic nature of the offense rather than on the factual circumstances

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1 On February 11, 2003, the present petition was dismissed for want of jurisdiction. The case was reopened after the Board of Immigration Appeals resolved Respondent's appeal. The facts involved were discussed in detail in the prior ruling and need not be restated here.

2 The other elements of § 1101(a)(43)(T)–namely, that the prospective appearance be "to answer or to dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed"–are not at issue here.

surrounding" the specific violation. Dalton v. Reno, 257 F.3d 200, 204 (2d Cir. 2001). "[O]nly the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant . . . ." Id.

Whether a conviction under § 53a-172 constitutes an aggravated felony under § 1101(a)(43)(T) was decided conclusively by this court in Barnaby v. Reno:

> [t]he elements of § 53a-172 are not found to meet the court order requirement of § 1101(a)(43)(T) . . . . [Legally called] is broader than [court order]. [Legally called] could include a clerk's scheduling, a law enforcement's officer's summons, and perhaps other ways deemed to legally call a defendant to appear . . . . Such cannot be found to constitute a court order.

142 F. Supp. 2d 277, 281 (D. Conn. 2001).

The force of the Barnaby decision is not diminished by the Board of Immigration Appeals' recent ruling to the contrary. (Mem. Supp. Mot. Reopen Relief from J., Ex.). District Courts "owe no deference to an agency's interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws . . . . [I]ts decision [is reviewed] *de novo*." Michel v. INS, 206 F.3d 253, 262 (2d Cir. 2000). This Court will deviate from neither Barnaby's holding nor its reasoning in the instant matter.

Respondent correctly notes, however, that § 53a-172 may be divisible. Divisibility is appropriate where the statute by which removability is triggered "encompasses offenses that both do and do not constitute [grounds for removal]." Sutherland v. Reno, 228 F.3d 171, 177 n.5 (2d Cir. 2000). Conn. Gen. Stat. § 53a-172 is divisible. See Barnaby, 142 F. Supp. 2d at 281.

In a divisibility inquiry, the court abandons the categorical approach in favor of a "modified categorical approach, in which [the court] look[s] to the record of conviction, including the indictment, plea, verdict, and sentence . . . ." Santapaola v. Ashcroft, 249 F. Supp. 2d 181, 189 (D. Conn.

2003). "The courts have emphasized that it is not what the alien did, but the crime of which he was convicted, determined by the record of conviction, that is dispositive." Id. at 190.

Respondent, however, has not substantiated that the IJ or BIA appropriately considered evidence relating to Petitioner's conviction (i.e., indictment, plea, verdict, and sentence) in ordering his removal. Respondent has produced only the transcript of Petitioner's guilty plea, which–while indicating that Petitioner was aware of the ramifications of his plea, including possible removal–does not indicate the existence of the required court order. It is therefore not apparent that Petitioner's commission of an aggravated felony was established "by clear and convincing evidence," see Barnaby, 142 F. Supp. 2d at 280, in the immigration proceedings, and as such the present order of removal may not stand.

The petition for writ of habeas corpus (Doc. No. 1) is **granted**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, August ___, 2003.

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Peter C. Dorsey
United States District Judge